IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA MERCEDES CHAVEZ-MARTINEZ, Appellant,	)	
vs.	)	NO. 22782
UNITED STATES OF AMERICA, Appellee.	)	

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a two-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant knowingly imported and brought 130 ounces of heroin and 20 ounces of cocaine into the United States from Mexico. The second count alleged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately 130 ounces of heroin and 20 ounces of cocaine, which the defendant knew had been imported and brought into the United States contrary to law.

Jury trial of appellant commenced on February 6, 1968, before United States District Judge Fred Kunzel [C. T. 13, 14].[1] Appellant was represented by appointed counsel, Warren Reese, of the Federal Defenders, Inc. Appellant was found guilty as charged in each count on February 7, 1968 [C. T. 12].

On March 5, 1968, appellant was committed to the custody of the Attorney General for imprisonment for a period of 20 years on each count, to be served concurrently [C. T. 17].

Notice of Appeal was filed on March 13, 1968 [C. T. 21].

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[1] "C. T." refers to the Clerk's Transcript.

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged error in failure of the trial Court to ask certain voir dire questions of the potential jurors.

2. Alleged error in denying appellant's motion to suppress statements made by appellant before the contraband was discovered.

3. Alleged error in denying appellant's motion to suppress statements made by appellant after the contraband was discovered.

4. Alleged error in admitting into evidence the above described statements.

5. Alleged error in receiving testimony by a Highway Patrol officer.

6. Alleged error in admitting a traffic citation into evidence.

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexicali, Mexico, at the Calexico Port of Entry on November 10, 1967 [R. T. 65-66].[2] She was driving a two-door sedan, license number QXR-027. This number was similar to two license numbers on "look-out" at the Port of Entry [R. T. 67].

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2 "R. T." refers to the Reporter's Transcript of Proceedings.

At the primary inspection point Inspector Harold Patty asked appellant her nationality, citizenship, how far she had travelled into Mexico, and if she had acquired any merchandise or was bringing any merchandise from Mexico. To this last question, appellant replied, "Nothing." [R. T. 68]

Appellant was then asked to open the trunk of the vehicle she was driving. Because appellant did not appear to know which key to use in the lock, Inspector Patty asked her if this was her car. She replied, "No, it belongs to a friend of mine in San Diego." [R. T. 69] This entire conversation was conducted in English [R. T. 70]. At this point, Mr. Patty felt justified in referring appellant to the secondary inspection area [R. T. 69].

At the secondary area she was met by Customs Inspector Knights [R. T. 69-70]. Mr. Knights asked her into the Customs office and asked Chief Inspector Smith to watch her while he (Knights) conducted a search of the automobile [R. T. 73].

Upon reviewing the lookout report, Knights noted that it stated, "heroin in gas tank." [R. T. 73-74]. He then returned to the vehicle and noticed fresh undercoating on the underside of the gas tank. The immediately surrounding area, but no other area of the vehicle, appeared to be freshly undercoated. At this time he also knocked on the underside of the gas tank and noticed that it didn't sound quite right. The automobile was then removed to the rear of the secondary inspection area, out of the lane of traffic [R. T. 74].

Chief Inspector Smith was informed of the findings and placed a call for a Customs Agent, Agent Richenberger [R. T. 74].

While awaiting the arrival of Mr. Richenberger, a conversation occurred between Mr. Knights and appellant [R. T. 75]. The conversation was conducted in English and Spanish, with Mr. Knights' Spanish being described by himself as "fair." [R. T. 84-85]

Mr. Knights, having noticed the name "Lourdes Rodriguez," on the temporary automobile registration certificate, asked appellant "to whom the vehicle belonged." She replied that it belonged to a friend of hers; that the friend's name was Lourdes Rodriguez who lived in the Los Angeles area; that she had met Lourdes a short time before on a street in Tijuana; that she (appellant) had borrowed the vehicle the day before; that she came to Mexicali to meet a friend named Olga; that she didn't know Olga's last name or her address; that at the present time she was going to the Los Angeles area to visit her mother who resided there; and that she was residing with an aunt and uncle at 120 Willow Street, San Ysidro, California [R. T. 76-79]. When Agent Richenberger later asked appellant her address, she replied, "Teniente Cecelia Garcia in Tijuana, Mexico." [R. T. 136] It was later elicited in trial, from testimony by a State of California Highway Patrolman, who had on August 18, 1967, issued appellant a traffic citation in a similar automobile within 10 miles of Calexico, and which automobile was registered to a "Lurds Gutierrez," that she gave the officer a

San Diego address of residence [R. T. 124-128], later found to be non-existent after investigation by a Customs agent [R. T. 129].

At a nearby garage, Customs agents and inspectors witnessed the removal of the gas tank from the automobile driven by appellant [R. T. 80-83]. Upon removal, the tank was found to have a concealed compartment which contained packages amounting to 130 ounces of heroin and 20 ounces of cocaine, the largest seizure of narcotics ever made in the Southern District [C. T. 18]. Stipulations were entered as to the contents and chain of custody of the seized contraband [R. T. 113-115].

Appellant was admonished of her Constitutional rights in English by Customs Agent Quick and then in Spanish by Customs Agent Martin. [R. T. 25-26, 53-54]. The Spanish and English admonitions were found to be substantially identical except that in Spanish the declaration of rights stated that if one cannot obtain an attorney by any other means, one will be assigned to him, and in English it states that if one cannot afford an attorney one will be provided for him [R. T. 52-57]. Appellant told the agents that she understood her rights and would tell them what they wanted to know [R. T. 27, 54, 256-257].

Appellant declined to sign the waiver form, stating that she didn't know what might be put on it after she signed it. She also said, "I'll tell you what you want to know." [R. T. 54] The trial Court determined that a written waiver was not necessary under the Miranda

case [R. T. 48], that the Miranda rule was complied with, and that the appellant understandingly and intelligently waived her right to have counsel present during her interrogation by Customs agents [R. T. 57].

Appellant told Agents Martin and Quick, in reference to the vehicle that she was driving, that she had only seen it the day prior to the date of her arrest. She also said that she borrowed the vehicle from "Lourdes Rodriguez" [R. T. 246-248, 250]. She stated that she owned a 1966 Chevrolet, but had to borrow a vehicle because her automobile was broken down. She later denied that she owned a vehicle [R. T. 254, 256].

Albert Toledo testified that he sold the vehicle in question to appellant for cash, amounting to about $395. 00; that appellant did not give the Maria Chavez-Martinez name; and that she signed the bill of sale as "Lourdes Rodriguez" [R. T. 67, 97-101].

Roger Boillin testified in regard to the same sale to appellant under the "Lourdes Rodriguez" name. He testified that appellant said that she did not know her address, so the vendor's address was used on the "pink slip." The transaction occurred on October 11, 1967 [R. T. 118-121].

Customs Agent Melvin Moore testified that the value of the heroin in question was approximately $50,000. 00 in Mexico with the cocaine worth approximately $12,000. 00 [R. T. 138].

Appellant testified that she was born in Sacramento, had been

living in Tijuana since August, and had lived all of her life in Sacramento, Los Angeles, and Tijuana [R. T. 169-171]. (The address given to Officer Ellis was a San Diego address, R. T. 128). Appellant claimed innocence [R. T. 182-183].

V

ARGUMENT

A. FAILURE TO ASK CERTAIN VOIR DIRE QUESTIONS OF THE POTENTIAL JURORS DID NOT CONSTITUTE ERROR.

Appellant complains of the failure of the trial judge, upon request, to ask the following voir dire questions of the potential jurors:

"1. Would the Judge's opinions so conveyed to you influence your ability to form your own opinion on the basis of the evidence and your deliberation in this case?

"2. This case involves an extraordinarily large quantity of narcotic, measurable in pounds. It will be shown that the defendant was the driver and sole occupant of the automobile in which the narcotics were concealed. Knowing this, do you feel that it is impossible that the defendant could be innocent?

"3. Would your attitude be the same if the circumstances just outlined were similar, except that the narcotics concealed in the automobile weighed only one or two ounces?

"4. Is there any juror who cannot accept, at the outset, the

proposition that it is possible the defendant did not know the narcotics were concealed in the automobile she was driving?"

The first of the above questions related to the possibility that the potential jurors might have been influenced by a trial judge's criticism of a jury in another case. However, only one member of the entire jury panel in the instant case had been present when the prior jury was criticized [R. T. 10]. In view of this fact, and in view of the fact that the possibility of jury prejudice was covered in the questions by the Court [R. T. 8-10], it is respectfully submitted that the failure to ask the question did not constitute an abuse of discretion.

The other three questions were not proper voir dire questions, because they would tend to provide no information of value in determining the qualifications of the potential jurors, and also because they were confusing and argumentative. These questions related to whether the potential jurors believed that it would be "impossible" for appellant to be innocent, or "possible" for her to have no knowledge of the narcotics, under a certain factual situation. All of the potential jurors would have had to answer the questions in the same manner, as practically anything is theoretically "possible," and few things are "impossible." It is "possible" that appellant thought that she was smuggling Viet Cong explosives rather than narcotics, but the test in a criminal trial is concerned with probabilities, not possibilities or certainties. Furthermore, the questions would have tended to confuse

the jurors in regard to the reasonable doubt rule, which does not require proof to an absolute certainty.

Since the questions were confusing and argumentative, and since the answers would have been known in advance, the trial Court properly declined to expend the time of the Court and litigants in asking these questions.

The questions suggested by appellant are somewhat analogous to the questions involved in United States v. Barra, 149 F. 2d 489, 490 (2nd Cir. 1945), in which the defendant attempted to obtain advance clues in regard to the potential jurors' attitude toward the alleged crime. The Court of Appeals upheld the refusal of the trial Court to ask the questions.

B. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S "MOTION" TO SUPPRESS STATEMENTS MADE TO CUSTOMS OFFICIALS PRIOR TO DISCOVERY OF THE CONTRABAND.

Due to failure to comply with Rule 47, Federal Rules of Criminal Procedure, appellant has failed to state a proper motion. Therefore, due to the fact that appellant did not raise an objection when the statements were introduced into evidence, appellant has failed to preserve a right to appeal on this point.

The attempted "motion" [R. T. 58] does not include any reference to statements made to Officer Patty. However, even though an

objection to their admissibility was never made at trial, appellant now on appeal objects to the admissibility of any such statements.

In regard to the statements made to Inspector Knights, appellant objected at one point but presented no evidence. The trial Judge, upon being informed that the statements were made at the border before the arrest, properly denied the motion, no evidence being offered [R. T. 58-59]. If the evidence for appellant supported the motion, such evidence should have been presented. However, when Inspector Knights testified concerning the statements, there was no objection [R. T. 64-69]. This constituted a waiver.

In reference to a statement made by appellant to Officer Patty [R. T. 69], counsel for appellant indicated prior to introduction of the statement: "And that as far as statements go, he asked her if the car was hers and she said, 'No, it belongs to a friend.' That doesn't bother me." [R. T. 15] [Emphasis added.] Furthermore, appellant agreed with the trial Judge that the Miranda warning need not be given to everyone who crosses the border [R. T. 58-59].

A defendant waives objection that a statement had been obtained under circumstances that did not meet Constitutional standards, by failing to object to their introduction at the trial level, and thereby fails to preserve a right to appeal on that point. Good v. United States, 378 F 2d 934, 936 (9th Cir. 1967); Lipton v. United States, 368 F. 2d 962, 965 (2nd Cir. 1966).

Assuming arguendo that appellant has preserved the right to appeal, error was not committed by admitting statements made by appellant to either Patty or Knights.

Appellant was not subjected to "custodial interrogation," which is defined by Miranda v. Arizona, 384 U. S. 436, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way."

Appellant was not in custody or deprived of her freedom in any significant way. Appellant's contention that Inspector Knights intended to confine appellant is unfounded. (Appellant's Brief, p. 23) The record neither shows that appellant was refused permission to depart, nor that she even desired to leave the Customs office.

Contrary to appellant's contention (Appellant's Brief, p. 23, lines 3-12) many of the "suspicious circumstances" arose after appellant was asked into the Chief Inspector's office. It was not until then that Knight first reviewed the "lookout" report and noticed that it stated, "heroin in gas tank." It was not until Knights further inspected the automobile that he discovered any indication of recent painting of the gas tank [R. T. 73-74]. Therefore, these factors could not have motivated Mr. Knights to ask appellant to accompany him to Chief Inspector Smith's office, because they arose afterwards. Further, "suspicious circumstances" by themselves do not require the Miranda warnings. The sole test as set out by Miranda is whether one is being

"interrogated while in custody or otherwise deprived of his freedom in any significant way."

United States v. Davis, 259 F. Supp. 496, 498 (D. C. Mass. 1966), held that statements made by the defendant, while the defendant was not under arrest but while Customs officials had him under detention, were not subject to exclusion on the grounds that they were elicited by questions unaccompanied by Miranda warnings, during alleged custodial investigation. In Davis, after marihuana had been found on board the boat being searched, Customs officers returned and searched the room of defendant Davis. An investigator found cigarettes in Davis's room. In addition to the statements listed immediately above, Davis also stated how much he had paid for them. During the search Davis was allowed to go to the bathroom only when escorted.

It is appellee's contention that the case at bar is very similar to the Davis case. The facts of the case at bar reflect that appellant was at most only being temporarily detained. In the instant case, appellant's car was being searched and the questions asked of appellant were only those necessary to expedite the matter. They were routine questions. If the Davis rationale is followed, the statements in question here were made while appellant was only being temporarily detained and not in custody or deprived of freedom in any significant way. Therefore, these statements were not subject to exclusion because of an alleged violation of the rule laid down in Miranda.

In Maguire v. United States, No. 22,223 (9th Cir. 1968), the same question was raised in appellant Maguire's brief as is being raised here: "Was sufficient warning given concerning constitutional rights, before interrogation by the United States Customs Authorities in compliance with the Miranda and Dorado doctrines?" (ROGER C. MAGUIRE, APPELLANT vs. UNITED STATES OF AMERICA, APPELLEE, BRIEF FOR THE APPELLANT, page 6.) Obviously this court considered such a contention frivolous, since the opinion recognizes the facts giving rise to the contention but does not attempt a discussion of the "issue" that was raised. Maguire v. United States, No. 22,223, pages 2-3, May 28, 1968 (9th Cir. 1968).

The questions were asked of Maguire after he had been referred to the secondary inspection area and without having been given any warnings concerning his Constitutional rights under Miranda. The questions and the responses to them were testified to by Mr. Cardwell. (Id., pages 15-16, 31-32) Appellant Maguire was convicted on one count of violating the Dyer Act (18 USC 2312).

Appellant was not questioned in the interrogation setting as described in Miranda v. Arizona, supra: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." Certainly then, at the border where the Immigration and Customs officers are authorized to stop people and make reasonable inquiries,

objection cannot be made to the statements made in response to the inquiries.

In addition to Davis, supra, other cases have held that a Customs detention does not constitute an arrest.

United States v. Jones, 184 Fed. Supp. 329 (D.C. Calif. 1960);

People v. Mitchell, 209 Cal. App. 2d 312, 318 (1962).

C. THE DENIAL OF THE MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT TO CUSTOMS AGENTS AFTER THE DISCOVERY OF THE NARCOTICS DID NOT CONSTITUTE ERROR.

Appellant contends that statements made by her after the narcoti
cotics were discovered by the officers should not have been received in evidence, as the statements allegedly were illegally obtained.

The statements in question were made to Customs Inspector Knights before the narcotics were discovered and to Customs Agents Quick and Martin after the narcotics were discovered [R. T. 74-79, 249-251, 253-254]. The discussion of the statements made to Inspector Knights appears under "B" above, and will not be repeated here.

In regard to the statements made to Agents Quick and Martin, they occurred after appellant had been thoroughly and completely warned of her Constitutional rights. The statements were entirely voluntary.

The gist of appellant's contention is that the result of her

inability to speak English, coupled with an incomplete warning in Spanish, rendered the bi-lingual warning of her Constitutional rights ineffective. Appellant argues that she was significantly deprived of her rights because the Spanish version of her Constitutional rights informed her that she had the right to an attorney and also "the right to have one obtained, to have one appointed for you if you have no other means of obtaining one." [R. T. 33] Thus appellant was given the full Miranda warning in Spanish as well as English [R. T. 33, 53-54].

However, she apparently is contending that her rights under the United States Constitution were violated because the officers did not employ the word, "afford," in one of the two warnings, although the English-language warning was complete, even to the use of the exact word, "afford." [R. T. 25-26, 55-56] Of course, the Spanish-language version was complete, as it merely substituted equivalent language for the verbal ritual favored by appellant.

Assuming, for purposes of argument only, that appellant's Spanish-language warning was not adequate, it is evident that she understood the English-language version.

Appellant, as authority for the premise that she cannot speak English well enough to understand the warnings given in English, cites the alleged difficulty she had conversing with a Highway Patrolman, Inspector Patty, Inspector Knights, Mr. Quick, and the salesman who sold her the automobile.

A review of the testimony of these witnesses demonstrates that appellant's premise is not supported by the facts. Appellant acknowledges that she spoke to Inspector Patty (Appellant's Brief, p. 27) in English, adding that the conversation was brief and simple. The following questions were understood and answered by appellant [R. T. 67-69].

(1) "What is your nationality?" or "What is your citizenship?"

(2) How far in Mexico had she traveled.

(3) Whether she acquired any merchandise or was bringing any merchandise from Mexico.

(4) Would she open the trunk?

(5) Is this your car?

The above questions, although brief, would not be simple to someone who had trouble with the English language.

Inspector Knights' interview with appellant [R. T. 76-79] was conducted both in English and Spanish. The record does not reflect which questions were asked in English and which questions were asked in Spanish. However, Inspector Knights did testify that appellant gave responses in English, and those questions that appellant did not seem to understand were asked in Spanish [R. T. 84].

The Highway Patrolman apparently conversed with appellant without any attending difficulty [R. T. 128]. Appellant admits speaking to this officer in English [R. T. 45].

Mr. Donald Quick interrogated appellant in English and received both English and Spanish responses [R. T. 255]. Quick testified that appellant told him that she understood her rights [R. T. 256-257].

Mr. Albert Toledo, a used car salesman, testified that he was able to confer with appellant sufficiently in English to sell her an automobile [R. T. 103]. Appellant was born in Sacramento [R. T. 169].

Independent of any of the above testimony, regarding the ability of appellant to understand English, is the testimony of Mr. Martin, who gave appellant the warning in Spanish. Mr. Martin testified that he heard appellant admit understanding the warnings in English before he gave her the warnings in Spanish [R. T. 249]. Furthermore, Mr. Martin testified that appellant said that she would answer anything because she was innocent and had nothing to hide. Appellant refused to sign the written waiver form, stating that she feared that the government would tamper with the signed instrument, and her refusal was not an indication that she did not desire to waive her rights [R. T. 249].

One could only conclude from the evidence supplied by the above witnesses, viewed on appeal in the light most favorable to the government, that appellant understood the English-language warning of her Constitutional rights.

In considering appellant's Miranda objection, it should be noted that there is a strong public policy against suppression of the truth by

barring a voluntary statement merely because a particular verbal ritual has not been followed by the officers. This public policy is indicated by the actions of the nation's highest law-making body in passing the Crime Control Act.

Appellant implies that certain special procedures outlined in Jackson v. Denno, 378 U. S. 368, and Sims v. Georgia, 385 U. S. 538, should have been followed in the instant case. However, Jackson, Sims, and related cases have no application here, because those cases involve procedures for determining voluntariness of a defendant's statements. Appellant did not raise an issue of voluntariness of her statements in the trial Court, so there was neither a request nor a justification for resort to the procedures outlined in Jackson and Sims.

D. TESTIMONY BY THE HIGHWAY PATROLMAN WAS PROPERLY RECEIVED IN EVIDENCE.

Appellant contends that the testimony by Officer Ellis, relating to the "Lurds Gutierrez" matter, was not admissible in evidence.

However, this testimony was clearly admissible for the purpose of tending to show that appellant falsified to Inspector Knights when questioned in regard to the instant case. She had provided Inspector Knights with the old "evil missing man" defense (in this case, the evil missing woman, "Lourdes Rodriguez"), claiming that she met "Lourdes Rodriguez" in the street and borrowed the vehicle from her [R. T. 75-76].

Appellant's use of a vehicle in the name of "Lourdes Gutierrez," or "Lurds Gutierrez" (apparently the spelling of the first name depended upon the officer's guess, R. T. 125-126, 145-146), was highly material, in view of the very unusual first name and the similarity of the "Gutierrez" and "Rodriguez" names, both nine-letter names ending in "e-z."

The evidence was admissible for other purposes also. In considering appellant's contention, it is helpful to review the facts as they were presented in trial. Testimony concerning a traffic citation issued less than three months prior to appellant's arrest for the crime and conviction herein being appealed, was admitted on condition that if the relevancy of it was not later made clear, the defendant could make a motion to strike the testimony [R. T. 124-127].

The facts and circumstances found by the trial Court to be sufficient to support the admission of the traffic citation into evidence were as follows: Officer Ellis testified that he cited appellant for a traffic violation on August 18, 1967 [R. T. 124-128]. Additional testimony by an investigating Customs agent demonstrated that appellant gave the citing Highway Patrolman a non-existent address [R. T. 128-130]. Other testimony by the Highway Patrolman was to the effect that the automobile appellant was driving at the time he cited her was registered to a "Lurds" or "Lourdes Gutierrez" [R. T. 125-126, 145-146]. Evidence was adduced that appellant also gave a false address

to the Border Patrol officers when she was arrested November 10, 1967, for the offense herein being appealed [R. T. 77-79, 92-93]. Documents indicating the automobile appellant was driving on November 10, 1967, was registered to a "Lourdes" Rodriguez, were admitted into evidence [R. T. 143-149]. Testimony that appellant purchased this vehicle using the name, "Lourdes" Rodriguez, and giving no address at all to the dealer for her residence, was also admitted into evidence [R. T. 97-102].

One further element, considered by the Court, was the theory of the Government as to the relevance of the circumstances under which the citation of August 18, 1967, was issued. The theory was this: Although the vehicles were manufactured in different years, the fact that they were both the same make of automobiles (the one driven on August 18, 1967, being a 1961 Plymouth and the one driven by appellant when arrested for this offense being a 1959 Plymouth), so the same gas tank might have been used in several different models and years of the same make automobile.

These are the facts and circumstances used by the Court in making a determination as to whether or not to admit the evidence as to the prior traffic citation: the similar and unusual first names used in the registrations of the automobiles driven by appellant at the time she received the traffic citation and at the time she was arrested for the offense being appealed; the false address given to the Highway

Patrolman; no address at all being given to the automobile dealer; and another false address given to the officers at the time of her arrest.

The facts in the instant case are distinguishable from the factual situation in the case cited in appellant's sole authority, Diaz-Rosendo v. United States, 364 F. 2d 941 (9th Cir. 1966). Furthermore, Diaz-Rosendo does not discuss the numerous exceptions to the general rule.

In addition, in the instant case, the evidence of appellant's statements to Officer Ellis was not being offered to prove the commission of the crime set forth in this indictment by the use of separate and distinct crimes not included in this indictment.

That the trial Judge possesses wide latitude in the determination of the relevancy or materiality of evidence, and that his ruling will not be reversed in the absence of an abuse of discretion, is well settled in this and other jurisdictions.

Wilson v. United States, 250 F. 2d 312 (9th Cir. 1957), reh. den., 254 F. 2d 391;

Holt v. United States, 342 F. 2d 163 (5th Cir. 1965), cert. den., 382 U. S. 868;

Cotton v. United States, 361 F. 2d 673 (8th Cir. 1966).

As to what constitutes an abuse of discretion, this Court set forth in Weller v. Dickson, 314 F. 2d 598, 600 (9th Cir. 1963), and later used as authority in FCC v. Schreiber, 329 F. 2d 517, 523 (9th

Cir. 1964), the following definition:

> "There is no exact measure of what constitutes an abuse of discretion. It is more than the substitution of the judgment of one tribunal for that of another. Judicial discretion is governed by the situation and circumstances of each individual case. Even where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion that is not justifiable in view of such situation and circumstances." [Emphasis added]

The Supreme Court has held that the "trial judge has broad discretion in the matter of admission or exclusion of . . . evidence and his action is to be sustained unless manifestly erroneous." Salem v. United States Lines, 370 U. S . 31, 35 (1962), rehearing denied, 370 U. S. 965, (this part of decision affirmed, case reversed and remanded on other grounds. For remand see 304 F. 2d 672).

Appellant complains that the prosecuting attorney allegedly presented some improper arguments to the jury. However, there was no objection at the time [R. T. 268-269, 313], so there is nothing of which to complain upon appeal.

> "Counsel for defense cannot as a rule remain silent, interpose no objections, and after a verdict has

been returned seize for the first time on the point that the comments to the jury were improper or prejudicial." Forsberg v. United States, 351 F. 2d 242, 249 (9th Cir. 1965); United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 238 (1948).

This court said further in the same opinion:

"Appellant also claims error in counsel's . . . argument . . . (T)hese remarks were made without objection by appellant. As this court said in Orebo v. United States, 9 Cir. 1961, 293 F. 2d 747, 749, 'This type of error would be easily correctible by the trial court upon seasonable objection'."

Where the conduct or argument of opposing counsel is improper, the procedure on the part of the defendant is to promptly object and request from the Court an instruction to the jury to disregard the statement.

The final argument in a case may contain, and counsel are permitted to argue, all reasonable inferences that can be drawn from the evidence adduced. Green v. United States, 282 F. 2d 388 (9th Cir. 1960), cert. denied, 365 U. S. 804. In further support of this statement of the law, this Court held in White v. United States, 315 F. 2d 113, 116 (9th Cir. 1963), cert. denied, 375 U. S. 821:

"(E)ven had there been a taint of unfairness or prejudice, no voice was raised in protest - no objection ever raised -

no chance given the trial court to cure any alleged error. This is a complete waiver."

E. THE TRAFFIC CITATION WAS PROPERLY RECEIVED IN EVIDENCE.

It does not appear that the traffic citation in question added anything of importance to the oral testimony already received. As the oral testimony was properly received is evidence (as discussed under "D" above), the traffic citation was admissible to supplement the testimony that was already in the record.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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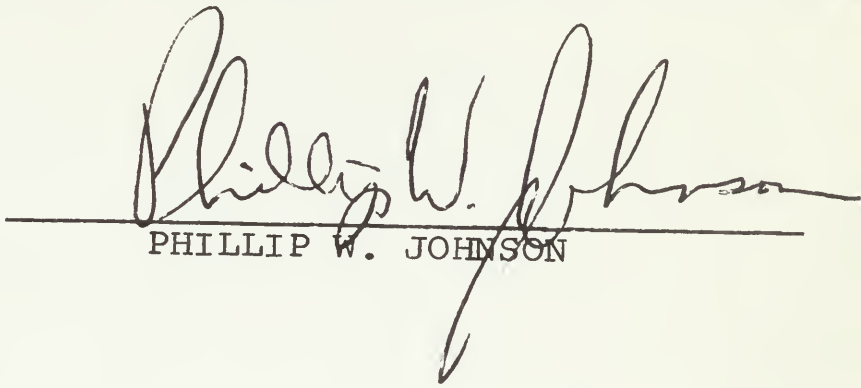
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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